

## § 9701.612

(d) The Department must deliver the notice to the employee on or before the effective date of the action.

### § 9701.612 Departmental record.

(a) *Document retention.* The Department must keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record must include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department must make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board or the MRP.

## NATIONAL SECURITY

### § 9701.613 Suspension and removal.

(a) Notwithstanding other provisions of law or regulation, the Secretary may suspend an employee without pay when she or he considers suspension in the interests of national security. To the extent that the Secretary determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the Secretary statements or affidavits to show why he or she should be restored to duty.

(b) Subject to paragraph (c) of this section, the Secretary may remove an employee suspended under this section when, after investigation and review as the Secretary considers necessary, the Secretary determines that removal is necessary or advisable in the interests of national security. The determination of the Secretary is final.

(c) An employee suspended under this section who has a permanent or indefinite appointment, has completed his or her initial service period, probationary

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period, or trial period, and is a citizen of the United States is entitled, after suspension and before removal, to—

(1) A written statement of the charges against the employee within 30 days after suspension, which may be amended within 30 days thereafter, and which must be stated as specifically as security considerations permit;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(3) A hearing, at the request of the employee, by a Department authority duly constituted for this purpose;

(4) A review of his or her case by the Secretary or designee, before a decision adverse to the employee is made final; and

(5) A written decision from the Secretary.

## SAVINGS PROVISION

### § 9701.614 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

## Subpart G—Appeals

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart G to part 9701 was rescinded.

### § 9701.701 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F of this part. These provisions require that the new appeals regulations provide Department employees fair treatment, are consistent with the protections of due process and, to the maximum extent practicable, provide for the expeditious handling of appeals.

### § 9701.702 Waivers.

When a specified category of employees is covered by an appeals system established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The

provisions of 5 U.S.C. 7702 are modified as provided in § 9701.709 to use “MSPB or MRP” wherever the terms “Merit Systems Protection Board” or “Board” occur. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB must follow the provisions in this subpart until conforming regulations are issued by MSPB.

### § 9701.703 Definitions.

In this subpart:

*Adjudicating official* means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

*Day* means calendar day.

*Harmful error* means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

*Mandatory removal offense (MRO)* means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department’s homeland security mission.

*Mandatory Removal Panel (MRP)* means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

*MSPB* means the Merit Systems Protection Board.

*Petition for review* means a request for review of an initial decision of an adjudicating official.

*Preponderance of the evidence* means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

### § 9701.704 Coverage.

(a) Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to employees who appeal furloughs of 30 days

or less, demotions, reductions in pay, suspensions of 15 days or more, or removals, provided such employees are covered by § 9701.604.

(b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(c) The appeal rights in 5 CFR 315.806 apply to the removal of an employee while serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period.

(d) Actions taken under § 9701.613 are not appealable to MSPB.

### § 9701.705 Alternative dispute resolution.

The Department and OPM recognize the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based negotiation to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The Department will use alternative dispute resolution methods where appropriate. Such methods will be subject to collective bargaining to the extent permitted by subpart E of this part.

### § 9701.706 MSPB appellate procedures.

(a) A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented by an attorney or other representative, and to a hearing if material facts are in dispute. However, separate procedures apply when the action is taken because of a mandatory removal offense or is in the interest of national security. (See §§ 9701.707 and 9701.613, respectively.)

(b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating